

1 LUBIN AND ENOCH, P.C.
2 Stanley Lubin (003076)
3 349 North 4th Avenue
4 Phoenix, Arizona 85003-1505
5 Telephone: (602) 234-0008
Facsimile: (602) 626-3586
Email: Stan@lubinandenoch.com

6 STUMPHAUZER, O'TOOLE, McLAUGHLIN,
7 McGlamery & Loughman Co., LPA
8 Dennis M. O'Toole (0003274)
9 Anthony R. Pecora (0069660)
10 Matthew A. Dooley (0081482)
11 5455 Detroit Road
12 Shefffield Village, Ohio 44054
13 Telephone: (440) 930-4001
Facsimile: (440) 934-7208
Email: dotoole@sheffieldlaw.com
apecora@sheffieldlaw.com
mdooley@sheffieldlaw.com

15 CONSUMER LITIGATION ASSOCIATES, P.C.
16 Leonard A. Bennett (Virginia Bar #27523)
17 Susan M. Rotkis (Virginia Bar #40693)
18 12515 Warwick Boulevard, Suite 100
19 Newport News, Virginia 23606
Telephone: (757) 930-3660
Facsimile: (757) 930-3662
Email: lenbennett@clalegal.com

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

23 KELVIN D. DANIEL, et al)
24 Plaintiffs,) **Case No.: 2:11-CV-01548-ROS**
25 vs.)
26)
27 SWIFT TRANSPORTATION) **FIRST AMENDED CLASS ACTION**
28 CORPORATION,) **COMPLAINT FOR JURY**
29
30 Defendant

Now come the Plaintiffs, Kelvin D. Daniel, Tanna Hodges and Robert R. Bell, Jr. on behalf of themselves and all other similarly situated individuals and allege the following claims:

PRELIMINARY STATEMENT

7 1. This is a class action on behalf of consumers
8
9 who were the subject of criminal background reports
10 obtained by Swift Transportation Corporation ("Swift")
11 as a precondition of employment with Swift during the
12 five-year period preceding the filing of this action
13 (the "Class Period") seeking remedies under the Fair
14 Credit Reporting Act ("FCRA"), 15 U.S.C. §1681, *et seq.*
15

JURISDICTION AND VENUE

18 2. The Court has subject matter jurisdiction
19 pursuant to 28 U.S.C. §1331 and 15 U.S.C. §1681p.

20 3. Venue is proper in the District of Arizona
21 because a substantial part of the events or omissions
22 giving rise to the allegations contained herein
23 occurred in the District of Arizona. 28 U.S.C. §
24 1391(b). Further, Swift maintains a principal place of
25 business in this judicial district.
26
27

PARTIES

4. Kelvin Daniel is a citizen of the State of Georgia, a Gulf War veteran and a "consumer" within the meaning of 15 U.S.C. § 1681a.

5. Tanna Hodges is a citizen of the State of Texas and a "consumer" within the meaning of 15 U.S.C. § 1681a.

6. Robert R. Bell, Jr. is a citizen of the State of Pennsylvania and a "consumer" within the meaning of 15 U.S.C. § 1681a.

7. Swift is a for-profit corporation with a principal place of business in Maricopa County, State of Arizona.

8. Further, Swift is a "person" using "consumer reports" to make "employment decisions" and take "adverse action" against "consumers", as those terms are defined by 15 U.S.C. § 1681a.

ALLEGATIONS AS TO DANIEL

9. On or about December 27, 2010, Daniel applied for a commercial truck driver position with Swift online.

²⁸ Following a successful application process.

1 Daniel was hired and scheduled to attend Swift's
2 orientation program.

3 11. On or about January 24, 2011, the first day of
4 in-person orientation, Swift ordered a criminal
5 background report regarding Daniel from HireRight
6 Solutions, Inc. ("HireRight") a consumer reporting
7 agency as defined by 15 U.S.C. § 1681a, without proper
8 authorization from Daniel.

9 12. At no time following Daniel's in-person
10 interaction with Swift, did he receive a clear,
11 conspicuous and stand-alone disclosure that a criminal
12 background report would be obtained for employment
13 purposes.

14 13. Immediately after receiving the subject
15 criminal background report, Swift took adverse action
16 against Daniel, dismissing him from orientation based
17 upon the information in the retrieved criminal
18 background report.

19 14. At no time did Swift provide Daniel with any
20 verbal or written notice that it intended to take
21 adverse action by declining employment based upon the
22 results of the report.

15. Daniel was not provided a copy of the report or a summary of his rights as required by 15 U.S.C. § 1681b(b) (3).

ALLEGATIONS AS TO HODGES

6 16. On or about September 25, 2009, Hodges applied
7 in-person for a commercial truck driver position with
8 Swift. A copy of Hodges's application is attached as
9
10 Exhibit A.

11 17. At no time did Hodges receive a clear,
12 conspicuous and stand alone disclosure that a criminal
13 background report would be obtained for employment
14 purposes.

16 18. Without proper authorization from Hodges,
17
18 Swift ordered a criminal background report regarding
19 Hodges from HireRight.

19. Immediately after receiving the subject
20
21 criminal background report, Swift took adverse action
22
23 against Hodges by determining to disqualify her from
24 further consideration for employment based upon the
25 information in the retrieved criminal background
26 report.

28 20. At no time did Swift provide Hodges with any

1 verbal or written notice that it intended to take
2 adverse action by declining employment based upon the
3 results of the report.
4

5 21. Hodges was not provided a copy of the report
6 or a summary of her rights as required by 15 U.S.C. §
7 1681b(b)(3).
8

9 **ALLEGATIONS AS TO BELL**

10 22. On or about October 2, 2009, Bell applied via
11 facsimile for a commercial truck driver position with
12 Swift. A copy of Bell's application is attached as
13 Exhibit B. Swift's application provides no indication
14 that a consumer report may be obtained for employment
15 purposes.
16

17 23. Bell did not authorize, nor was he requested
18 by Swift verbally, electronically or in writing, to
19 authorize the procurement of a criminal background
20 report to be provided HireRight.
21

22 24. Further, prior to obtaining Bell's criminal
23 background report, Swift did not provide Bell with
24 verbal, electronic or written notice of his rights to:
25 1) obtain a free copy of a criminal background report
26 from the consumer reporting agency within 60 days; and
27
28

1 2) to dispute the accuracy or completeness of any
2 information in the consumer report directly with the
3 consumer reporting agency.
4

5 25. After receiving Bell's application, Swift -
6 without any authorization from Bell - ordered a
7 criminal background report regarding Bell from
8 HireRight that grossly misidentified Bell as having
9 been convicted of felony burglary, felony robbery,
10 grand larceny and several parole violations, all
11 leading to a ten-year prison sentence. None of these
12 crimes were committed by Bell.
13
14

15 26. On October 2, 2009, immediately after
16 receiving the subject criminal background report, Swift
17 took adverse action against Bell by determining not to
18 hire him based upon the results of the report.
19
20

21 27. At no time did Swift provide Bell with any
22 verbal, written or electronic notice that it intended
23 to take adverse action by declining employment based
24 upon the results of the report.
25
26

27 28. Bell was never advised by Swift of the reason
28 for the adverse action, nor did he learn of the
inaccurate report until receiving a copy via U.S. Mail
29
30

1 from HireRight on or about October 7, 2009, when he
2 received a derogatory letter and a copy of the report
3 from HireRight.
4

5 **ALLEGATIONS AS TO THE COMMON QUESTIONS**

6 29. For many years, Swift has purchased criminal
7 background reports from consumer reporting agencies
8 trafficking in the reputations of America's workforce,
9 which are used as a basis for taking adverse action
10 against job applicants.

12 30. Swift does not provide or obtain an
13 appropriate disclosure and authorization from job
14 applicants as required by 15 U.S.C. § 1681b(b)(2) prior
15 to acquiring these criminal background reports.
16

18 31. Further, Swift does not provide pre-adverse
19 action notice to job applicants, including a copy of
20 the applicants' criminal background report and a
21 statement of the applicants' rights as required by 15
22 U.S.C. §§ 1681b(b)(3) and 1681m(a).

24 32. Swift's violations of the FCRA have been
25 willful, wanton and reckless in that Swift knew, or
26 reasonably should have known, that it was failing to
27 comply with the requirements of the FCRA.
28

33. 15 U.S.C. §1681n(a) permits a consumer to recover statutory and punitive damages, along with attorneys' fees and costs for willful violations of the FCRA.

CLASS ACTION ALLEGATIONS

34. Pursuant to F. R. Civ. P. 23, Daniel, Hodges and Bell bring this action on behalf of the Class initially defined below:

Consumers residing in the United States who applied for employment with Swift, and about whom Swift procured a criminal background report for employment purposes during the application process.

35. Hodges and Daniel also allege the following sub-classes, of which they are a member:

Inadequate Disclosure and Authorization In-Person Contact

a. Consumers residing in the United States who applied for employment with Swift, and during the application process, about whom Swift procured a criminal background report or other consumer report without first in a document that consisted solely of the disclosure, (i) providing the consumer with a disclosure in writing in a document that consisted solely of the disclosure that a consumer

1 report would be obtained for
2 employment purposes, and (ii)
3 obtaining the consumer's express
4 written authorization to procure
such consumer report.

5 **Pre-Adverse Action Notice**
6 **In-Person Applicants**

7 b. All natural persons
8 residing in the United States
9 (a.) who applied for an
employment position with
10 Defendant or any of its
11 subsidiaries, (b.) as part of
12 this application process, were
13 the subject of a consumer report
14 obtained by Defendant during the
15 applicable limitations period as
16 established by 15 U.S.C. 1681p,
17 preceding the filing of this
18 action and during its pendency,
19 (c.) whose report was obtained
20 by Swift at the same time or
21 after there had been at least
22 one in-person interaction with
23 the consumer, (d.) where that
24 consumer report contained at
25 least one derogatory item that
26 would disqualify the person from
27 such position under Defendant's
28 hiring policies, (e.) which
consumer was not then approved
or hired for the position, (f.)
and to whom Defendant did not
provide a copy of the consumer
report and other disclosures
stated at 15 U.S.C. §
1681b(b) (3) (A) (ii) at least five
business days before the date
the employment decision is first
noted in Defendant's records.

36. Bell also alleges the following sub-classes, of which he is a member:

**Inadequate Disclosure and Authorization
Contact by Facsimile, Telephone, Mail, Computer and
Similar Means**

a. Consumers residing in the United States who applied for employment with Swift via facsimile, an internet website, electronic mail, regular mail, or through a third party and during the application process, Swift procured a criminal background report or other consumer report, which report was obtained by Swift before there had been at least one direct telephone or in-person interaction with the consumer, without (a.) first obtaining direct electronic or written authorization to procure a consumer report, and/or (b.) directly providing the consumer with notice of their right to obtain a free copy of a consumer background report from the consumer reporting agency within 60 days, and to dispute the accuracy or completeness of any information in the consumer report directly with the consumer reporting agency.

Adverse Action
Contact by Facsimile, Telephone, Mail, Computer and
Similar Means

b. All natural persons residing in the United States (a.) who applied for an employment

1 position with Defendant or any
2 of its subsidiaries, (b.) as
3 part of this application process
4 were the subject of a consumer
5 report obtained by Defendant
6 during the applicable
7 limitations period as
8 established by 15 U.S.C. 1681p,
9 preceding the filing of this
10 action and during its pendency,
11 (c.) where that consumer report
12 contained at least one
13 derogatory item that would
14 disqualify the person from such
15 position under Defendant's
16 hiring policies, (d.) which
17 consumer was not then approved
18 or hired for the position, (e.)
19 who did not have either direct
20 telephone or direct in-person
21 contact with Swift and (f.) to
22 whom Defendant did not provide
23 direct electronic or written
24 notice that: the adverse action
25 was taken based in whole or in
26 part on the consumer report, the
27 name, address, and telephone
28 number of the consumer reporting
agency, that the consumer reporting
agency did not make the decision to take adverse
action and would be unable to
provide the consumer with specific
reasons why the adverse action was taken, and that the
consumer could request a free copy of the report and dispute
the accuracy or completeness of the report, as required by
1681b(b) (3) (B).

27 37. Upon information and belief, the putative
28 Class exceeds 5,000 members. Information concerning

1 the exact size of the putative class is within the
2 exclusive possession of Swift.

3 38. The Class members are so numerous that joinder
4 of all members is impracticable.

5 39. Hodges', Daniel's and Bell's claims are
6 typical of the claims of the other Class members as all
7 Class members were similarly affected by Swift's
8 unlawful conduct in violation of the FCRA.

9 40. Hodges, Daniel and Bell will fairly and
10 adequately protect the interest of the Class members
11 and has retained counsel competent and experienced in
12 complex class-action litigation. Hodges, Daniel, and
13 Bell are members of the Class and do not have any
14 interests antagonistic to or in conflict with the
15 members of the Class. Further, Hodges's, Daniel's and
16 Bell's claims are the same as those of the Class, which
17 all arise from the same operative facts and are based
18 upon the same legal theories.

19 41. Common questions of law and fact exist as to
20 all Class members and predominate over any questions
21 solely affecting individual Class members, including:
22
23

In-Person Contact

- a. Whether Swift's standard procedure violated 15 U.S.C. §1681b(b) (2) (A) (i) by failing to make a "clear and conspicuous" disclosure in a document that consists solely of the disclosure;
- b. Whether it is Swift's standard procedure to obtain a written authorization to procure or cause to be procured consumer reports for employment purposes required by §1681b(b) (2) (A) (ii);
- c. Whether it is Swift's standard procedure to provide a copy of the consumer report to the applicant or employee before declining to hire or discharging the applicant or employee based on the results thereof as required by 15 U.S.C. §1681b(b) (3) (A) (i);
- d. Whether Swift provided a copy of a summary of the applicant or employee's rights under the FCRA before declining to hire or discharging the applicant or employee as required by 15 U.S.C. §1681b(b) (3) (A) (ii);
- e. Whether Swift provided oral, written or electronic notice of the adverse action to the consumer that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer with the specific reasons why the adverse action

was taken as required by 15 U.S.C. §1681m(a)(2)(B);

f. Whether Swift provided oral, written or electronic notice of the consumer's right to obtain a free copy of the consumer report on the consumer from the consumer reporting agency that prepared the report as required by 15 U.S.C. § 1681m(a)(3)(A);

**Contact by Facsimile, Telephone, Mail, Computer and
Similar Means**

g. Whether Swift's standard procedure violated 15 U.S.C. § 1681b(b)(2)(B)(i) by failing to provide the consumer with verbal, electronic, or written notice of a right to obtain a free copy of a consumer background report from the consumer reporting agency within 60 days, and to dispute the accuracy or completeness of any information in the consumer report directly with the consumer reporting agency.

h. Whether Swift's standard procedure violated 15 U.S.C. §1681b(b)(2)(B)(ii) by failing to obtain verbal, electronic or written consent to procure a consumer report;

i. Whether Swift, within 3 business days of taking adverse action, provided oral, written or electronic notification to consumer that adverse action has been taken based in whole or in part on a consumer report received from a consumer

reporting agency as required by
§1681b(b)(3)(B)(i)(I);

j. Whether Swift, within 3 business days of taking adverse action, provided oral, written or electronic notification to consumer that of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) as required by §1681b(b)(3)(B)(i)(II);

k. Whether Swift, within 3 business days of taking adverse action, provided oral, written or electronic notification to consumer that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the specific reasons why the adverse action was taken; as required by §1681b(b)(3)(B)(i)(III);

1. Whether Swift, within 3 business days of taking adverse action, provided oral, written or electronic notification to consumer that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information

in a report as required by
§1681b(b)(3)(B)(i)(IV);

m. Whether Swift, within 3 business days of receiving a consumer's request for a copy of a consumer report from the person who procured the report, together with proper identification, provides the consumer a copy of a report and a copy of the consumer's rights as prescribed by the Federal Trade Commission under section 1681g (c)(3) of this Fair Credit Reporting Act as required by §1681b(b)(3)(B)(ii); and

n. Whether Swift's failures to comply with the FCRA were willful.

42. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because the membership of the Class is so numerous and involves claims that, taken individually, may not justify the costs and effort of bringing suit.

43. Further, the prosecution of several actions by individual members of the Class would create a risk of varying adjudications with respect to members of the Class, as well as create inconsistent standards of conduct for those opposing the Class. Additionally, individual actions by members of the Class may be

1 dispositive of the interests of other members not
2 parties to the adjudication of the claim, which would
3 impair or impede the ability of those individuals to
4 protect their interests.
5

6 **COUNT ONE - CLASS CLAIM BY DANIEL AND HODGES**
7 **DISCLOSURE AND AUTHORIZATION - IN-PERSON CONTACT**

8 44. Daniel and Hodes reallege and incorporate by
9 reference all preceding allegations of law and fact.
10

11 45. Swift willfully violated 15 U.S.C. §
12 1681b(b)(2)(A)(i) by failing to provide applicants and
13 employees with a clear and conspicuous written
14 disclosure in a document consisting solely of the
15 disclosure that a consumer report may be obtained for
16 employment purposes.
17

18 46. Swift willfully violated 15 U.S.C. §
19 1681b(b)(2)(A)(ii) by failing to obtain a valid
20 authorization in writing from Daniel, Hodges and the
21 Class members to procure a consumer report for
22 employment purposes.
23

25 47. Daniel, Hodges and the Class members seek
26 statutory damages for these violations pursuant to 15
27 U.S.C. § 1681n(a)(1)(A).
28

48. Daniel, Hodges and the Class members also seek

1 punitive damages for these violations pursuant to 15
2 U.S.C. § 1681n(a)(2).

3 49. In the alternative to the allegations that
4 these violations were willful, Daniel, Hodges and the
5 Class members allege that the violations were negligent
6 and seek issue certification of that issue and an
7 appropriate remedy, if any, pursuant to 15 U.S.C. §
8 1681o.

11 **COUNT TWO - CLASS CLAIM BY DANIEL AND HODGES**
12 **PRE-ADVERSE ACTION - IN-PERSON CONTACT**

13 50. Daniel and Hodges reallege and incorporate by
14 reference all preceding allegations of law and fact.

15 51. Swift willfully violated 15 U.S.C. §
16 1681b(b)(3)(A)(i) by failing to provide a copy of the
17 consumer report used to make an employment decision to
18 Daniel, Hodges and the Class Members before taking
19 adverse action that was based in whole or in part on
20 that report.

21 52. Swift willfully violated 15 U.S.C. §
22 1681b(b)(3)(A)(ii) by failing to provide a copy of the
23 summary of rights required by this section to Daniel,
24 Hodges and the Class Members before taking adverse
25 action that was based in whole or in part on a consumer

report.

53. Daniel, Hodges and the Class members seek statutory damages for these violations pursuant to 15 U.S.C. § 1681n(a)(1)(A).

54. Daniel, Hodges and the Class members also seek punitive damages for these violations pursuant to 15 U.S.C. § 1681n(a)(2).

55. In the alternative to the allegations that these violations were willful, Daniel, Hodges and the Class members allege that the violations were negligent and seek issue certification of that issue and an appropriate remedy, if any, pursuant to 15 U.S.C. § 1681o.

COUNT THREE - CLASS CLAIM BY BELL
AUTHORIZATION - CONTACT BY FACSIMILE, MAIL, COMPUTER
AND SIMILAR MEANS

56. Bell realleges and incorporates by reference all preceding allegations of law and fact.

57. Swift willfully violated 15 U.S.C. §1681b(b)(2)(B)(ii) by failing to obtain the applicants' oral, written or electronic consent prior to procuring a consumer report for employment purposes.

²⁸ 58 Bell and the Class members seek statutory

1 damages for these violations pursuant to 15 U.S.C.
2 §1681n(a)(1)(A).

3 59. Bell and the Class members also seek punitive
4 damages for these violations pursuant to 15 U.S.C.
5 §1681n(a)(2).

6 60. In the alternative to the allegations that
7 these violations were willful, Bell and the Class
8 members allege that the violations were negligent and
9 seek issue certification of that issue and an
10 appropriate remedy, if any, pursuant to 15 U.S.C.
11 §1681o.

12 **COUNT FOUR - CLASS CLAIM**
13 **ADVERSE ACTION - CONTACT BY FACSIMILE, MAIL, COMPUTER**
14 **AND SIMILAR MEANS**

15 61. Bell realleges and incorporates by reference
16 all preceding allegations of law and fact.

17 62. Swift willfully violated 15 U.S.C.
18 §1681b(b)(3)(B)(i) by taking adverse action based in
19 whole or in part upon the consumer report without
20 providing verbal, electronic or written notice within 3
21 business days of taking the adverse action (i) that
22 adverse has been taken based in whole or in part on the
23 consumer report, (ii) the name, address and telephone
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25
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27
28

1 number of the consumer reporting agency, (iii) that the
2 consumer reporting agency did not make the decision to
3 take adverse action and is unable to provide the
4 consumer with specific reasons why the adverse action
5 was taken, (iv) that the consumer may request a free
6 copy of the report and may dispute with the consumer
7 reporting agency the accuracy or completeness of the
8 report.

11 63. Bell and the Class members seek statutory
12 damages for these violations pursuant to 15 U.S.C.
13 §1681n(a)(1)(A).

15 64. Bell and the Class members also seek punitive
16 damages for these violations pursuant to 15 U.S.C.
17 §1681n(a)(2).

19 65. In the alternative to the allegations that
20 these violations were willful, Bell and the Class
21 members allege that the violations were negligent and
22 seek issue certification of that issue and an
23 appropriate remedy, if any, pursuant to 15 U.S.C.
24 §1681o.

27 **WHEREFORE**, Daniel, Hodges, Bell and the putative
28 class respectfully pray for the following relief:

- A. An order certifying the proposed class herein pursuant to Fed. R. Civ. P. 23 and appointing the undersigned counsel to represent same;
- B. The creation of a common fund available to provide notice of and remedy Swift's unlawful conduct;
- C. Statutory and punitive damages for all class claims;
- D. Attorneys' fees, expenses and costs;
- E. Pre-judgment and post-judgment interest as provided by law; and
- F. Such other relief as the Court deems just and proper.

Respectfully Submitted,

STUMPHAUZER O' TOOLE MCLAUGHLIN
McGILAMERY & LOUGHMAN CO. LTD.

/s/ Dennis M. O'Toole
/s/ Matthew A. Dooley
/s/ Anthony R. Pecora

LUBIN AND ENOCH, P.C.

/s/ Stanley Lubin

LITIGATION ASSOCIATES, P.C.

/s/ Leonard A. Bennett

Counsel for Plaintiffs

JURY DEMAND

Plaintiffs demand a trial by a jury as to all issues presented herein.

STUMPHAUZER O' TOOLE MCLAUGHLIN
McGLAMERY & LOUGHMAN CO LPA

/s/ Matthew A. Dooley

CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing First Amended Class Action Complaint was filed electronically this 24th day of October, 2011. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

/s/ Matthew A. Dooley
Counsel for Plaintiffs